Switzerland

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Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

Whether an acquisition is carried out by way of acquisition of stock (share deal) or acquisition of business assets and liabilities (asset deal) has different tax implications for the seller and the acquirer. An acquirer often prefers an asset deal as in this case the tax risks transferred with the acquired business are very limited: tax risks of the acquired business may be inherited in the areas of VAT, customs, social security and real estate taxes. Further, a step-up in basis and tax deductible depreciation is, in principle, possible (see question 2) and interest for acquisition debt may be set-off against taxable income of the acquired business.

Sellers typically prefer share deals in order to benefit from privileged tax treatment of capital gains (for Swiss corporate sellers), respectively tax-exemption in the case of Swiss-resident private individual sellers, except in cases of an indirect partial liquidation (see below). The acquirer of shares in a Swiss company assumes potential historic tax risks and the tax book values of the target company, since both remain unchanged in the target company. The goodwill reflected in the share price generally cannot be written off against taxable profits. The allocation of interest expenses on acquisition debt of the acquirer cannot be directly set off against taxable income of the target, but requires additional structuring. It should be noted that the acquisition of a partnership interest is, from an income tax perspective, generally treated like an asset deal and results in a step-up for the acquirer.

In case of an asset deal, potential tax loss carry-forwards of the business remain with the seller. The asset transfer is generally subject to VAT at 8 per cent on the transfer of taxable goods and goodwill to the extent the assets are purchased by a Swiss-based company or permanent establishment. The asset transfer between two Swiss entrepreneurs for Swiss VAT purposes may be carried out without VAT payment by way of notification procedure (eg, if an organic unit is transferred). Should real estate be transferred, special cantonal or communal tax rules need to be considered (real estate gains taxation for the seller, real estate transfer taxes).

In case of a share deal, the target company may continue to use a potential tax loss carry-forward and can set it off against a taxable profit during the ordinary tax loss carry-forward period of seven years. The acquisition of shares in a Swiss company is not subject to Swiss VAT, independent of the domicile of a corporate acquirer. Special considerations should be given in case the selling shareholders are Swiss-resident private individuals selling (alone or together) at least 20 per cent in the share capital of a Swiss company: under certain circumstances, this could create an indirect partial liquidation risk for the sellers. That is, re-qualification of tax-free capital gain into taxable investment income, if the target company makes a harmful distribution of previously accumulated profits to the buyer within five years after the transaction, for which the sellers typically include an indemnity clause in the sale and purchase agreements (SPA). Furthermore, in situations where the foreign resident sellers could not avail themselves of a full refund of Swiss withholding taxes on dividends received from the Swiss target company, buyers residing in Switzerland or in a jurisdiction having a favourable tax treaty with Switzerland may be facing an ongoing, latent full Swiss withholding tax exposure on undistributed profits ('tainted old reserves' of the target company as of the date of the share acquisition).

With regard to transaction taxes, see question 6.

2 Step-up in basis

In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

In case the purchase price in an asset deal exceeds the fair market value of the net assets of an acquired business, an acquirer may capitalise such difference as goodwill, which is typically depreciated as per Swiss tax and accounting rules at 40 per cent per annum (declining balance method; remaining amount depreciated in last year) or at 20 per cent per annum (straight-line method) over five years. The same depreciation generally applies to the part of the purchase price allocated to intellectual property (IP). Such depreciation expense is generally deductible from taxable income.

In case of a share deal, the purchase price is entirely allocated to the shares acquired and the taxable basis of the target company remains unchanged (ie, no goodwill is recognised). A depreciation on the acquired shares is typically not possible for a Swiss acquirer, unless there is a decrease in the fair market value of the shares. Such adjustment of the share value is tax deductible for a Swiss corporate acquirer; however, if the value of a participation of at least 10 per cent recovers in subsequent years, Swiss tax authorities may demand the reversal of the adjustment or depreciation up to the original acquisition cost basis, which is taxable.

3 Domicile of acquisition company

Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

In case of an asset deal, a Swiss acquisition company is highly preferable from a tax and legal perspective. Otherwise, the acquired business will likely constitute a permanent establishment of a foreign acquirer, creating the need to prevent international double taxation through the allocation of profits between the acquirer's foreign head office and its Swiss permanent establishment.

Even though Switzerland has no tax-consolidation rules (except for VAT), a Swiss acquisition company may be a good choice for a share deal. In case it fulfils the required conditions, the acquisition company may benefit from the holding company taxation (effective tax rate of 7.83 per cent due to full income tax exemption on cantonal and communal level, participation deduction for qualifying dividends and capital gains at the federal tax level, see below); however, the cantonal and communal holding company exemption will eventually (with a certain transition period) be abolished with the introduction of the Tax Proposal 17 (Steuervorlage 17; SV17) expected to enter into force not before 1 January 2020. Also after implementation of the SV17, Switzerland will be an attractive location for the acquisition company

due to low overall effective tax rates (eg, around 11.3 per cent in the canton of Lucerne or around 12 per cent in the canton of Schwyz) and new tax reduction measures that may be introduced in the context of the SV17 (eg, reductions of cantonal capital tax, tax privileged step-up). Switzerland has no controlled foreign corporation (CFC) regime and is currently also not planning to introduce such rules.

Any dividend income from qualifying participations of at least 10 per cent (or with a fair market value of at least 1 million Swiss francs) and capital gains on the sale of qualifying participations of at least 10 per cent held for at least one year benefit from the participation deduction scheme under which such income is virtually tax-exempt.

Further, a Swiss acquisition company may benefit from a tax-neutral reorganisation in the sense of the Mergers Act (eg, a merger with the Swiss target company if required by the financing banks). Also, the Swiss target company can distribute dividends without withholding tax if the Swiss company holds at least 20 per cent in the Swiss subsidiary and the dividend is timely notified (except where 'old reserves' exist, see question 1).

It should be noted that the equity capitalisation of a Swiss acquisition company by its direct shareholder is principally subject to 1 per cent stamp duty (the first 1 million Swiss francs of contributed capital is exempt). However, there are ways to structure around this, such as implementing an indirect capital contribution (ie, equity funding not by the direct, but indirect shareholder). In case of a debt-financed acquisition, a Swiss acquisition company with mainly only dividend income may not benefit from tax-deductible interest expenses due to its lack of taxable income. However, there are certain debt pushdown strategies available by which interest expenses can be allocated to a Swiss target company and be set off against its taxable income. Swiss thin capitalisation rules principally need to be considered if the acquisition company is funded by shareholder or related party debt (including third-party debt that is secured by shareholders or related parties). Interest on such debt is only tax deductible if certain debt-to-equity ratios are complied with and the interest does not exceed arm's-length terms. Generally, the debt funding of investments (shares) is limited to 70 per cent of the fair market value of such investment. As Switzerland has a broad treaty network, no CFC rules, an attractive income tax regime and usually offers possibilities to structure around potential tax inefficiencies, a Swiss acquisition company is often preferable.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

An immigration merger (inbound into the Swiss target) is possible based on the same provisions that apply for a Swiss domestic merger, that is one that can be carried out tax-free (ie, without taxable realisation of hidden reserves) if the following conditions are met: continued tax liability in Switzerland and transfer at current (tax) book value. The main question in case of an inbound merger is: will the foreign legislation permit such a merger and under what conditions? Furthermore, if a foreign company merged with a Swiss company has hidden reserves and the merger is made at (tax) book values, generally no step-up of the income tax values for Swiss tax purposes may be possible. This, however, may change with the SV17 (see question 3). Swiss withholding tax may be triggered if the nominal share capital and qualifying capital contribution reserves in the Swiss merged entity increase or if reserves subject to Swiss withholding tax would be extinguished, such as if the merger is done with a company in a loss situation. Considerations for exiting Swiss shareholders are generally taxed like ordinary purchase price proceeds except if such considerations are paid by the merged company (taxed like dividends). Swiss individual shareholders holding the shares as private assets incur taxable income if they benefit from higher share capital or capital contribution reserves in the merged company.

A more popular alternative to an immigration merger is a quasi-merger as a share-for-share exchange between the acquiring and target companies, whereby the shareholders of the target company are compensated with (new) shares of the acquiring company. A tax-neutral quasi-merger requires that the acquisition company obtains at least 50 per cent of the voting rights of the target and the shareholders obtain at least 50 per cent of the value of the target in new shares of the acquirer (ie, the cash component may not exceed 50 per cent of the value of the target). In case of a quasi-merger, the target remains a separate entity (as opposed to a statutory merger resulting in just one entity). In inbound cases (and the acquisition of a Swiss private entity), a foreign acquirer would typically set up a Swiss acquisition company, which would then acquire a Swiss target via share-for-share exchange based on the conditions outlined above. In this case, the Swiss acquisition company typically issues new shares to the tendering shareholders of the Swiss target company with a modest nominal share value and a large share issuance premium, which together reflect the market value of the acquired shares. The share premium may be booked and reported for Swiss withholding tax purposes as capital contribution reserves of the Swiss acquisition company, which could later be distributed free of Swiss dividend withholding tax. Such quasi-merger is exempt from the 1 per cent Swiss stamp issuance duty.

Qualifying quasi-mergers with Swiss target companies are in general tax-neutral for the acquiring and target entities. Swiss resident individual shareholders holding the shares of the target company as private, non-business assets are considered to realise a tax-exempt capital gain (or loss) upon the exchange (share and other consideration, if any). Swiss resident corporations or individuals holding the shares of the target company as business assets may be able to roll over their tax basis in the target company shares into the shares of the acquiring company provided the book values are continued.

For a public takeover, a triangular (quasi-) merger may often be a possibility, where the shareholders of an acquired company do not receive shares in the acquiring company, but shares of the top listed company instead. Following a public takeover, the target company may be merged with the acquiring (Swiss) company to squeeze out remaining shareholders (maximum 10 per cent).

5 Tax benefits in issuing stock

Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

For a Swiss acquisition company, the issuance of stock as consideration may be beneficial if the requirements for a tax-neutral quasi-merger are met (see question 4). In particular, at least 50 per cent of the fair market value of the Swiss target are compensated with (newly issued) shares of the acquisition company. Such quasi-merger is preferential for the Swiss acquirer as the contribution of the target shares will generally not trigger stamp duty, the acquisition of remaining target shares will benefit from a Swiss securities transfer tax exemption (see question 6, which could otherwise arise in a cash acquisition in case a securities' dealer is involved in the acquisition) and the Swiss acquisition company can create capital contribution reserves that may be later distributed without Swiss dividend withholding tax. For Swiss sellers holding the shares in the target as business assets, the stock consideration may result in a deferral of the capital gain or rollover of the tax basis in the target shares.

6 Transaction taxes

Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

From a Swiss stamp duty perspective, the securities transfer tax of 0.15 per cent (ie, 0.075 per cent per party) on Swiss securities and 0.3 per cent (ie, 0.15 per cent per party) on foreign securities may arise in case of a share deal if a qualifying 'Swiss securities dealer' is involved in the transaction either as a party or an intermediary. The term 'Swiss securities dealer' includes not only professional securities traders, banks, brokers, asset managers and the like, but also all Swiss resident corporate entities whose assets consist, as per the last annual balance sheet, of taxable securities in excess of 10 million Swiss francs. A securities dealer involved principally has to pay:

- in case he or she acts as intermediary: half of the burden for each party to the transaction that is not itself a registered securities dealer or exempt party; or
- in case it is a party to the transfer: half of the burden for itself and half of the burden for its counter party that is not a registered securities dealer or exempt party.

Certain restructuring exemptions apply, but rarely in case of a transaction between unrelated parties. Swiss or foreign securities, such as bonds, shares or other securities that are sold in an asset deal may also be subject to Swiss securities transfer tax if a Swiss securities dealer is a party or intermediary in the transaction.

Further, most cantons or communes impose a real estate transfer tax upon a transfer of real estate (asset deal) and, in most cantons or communes, also in case of a share deal if a majority of shares in a real estate company is sold. The liability (buyer or seller) differs per canton and does not apply in case of tax-neutral reorganisations or mergers. In addition, real estate register fees and notary fees may arise on the transfer of real estate.

In case of an asset deal, the transfer of such assets is generally subject to 8 per cent (standard rate) or 2.5 per cent (reduced rate for certain assets) VAT except for assets that are not within the scope of VAT (eg, assets located abroad) or exempt from VAT (eg, receivables or real estate). VAT is generally payable by the transferor, unless the notification procedure applies or the transfer is made to a foreign acquirer (exemption for export of goods; export of services such as IP, which are taxable at the place of the acquirer). The transfer of real estate can be subjected to VAT unless the real estate is only used for private purposes. However, the VAT liability can in certain cases be fulfilled by applying the notification procedure, which must be applied if:

- both parties are subject to Swiss VAT;
- the VAT amount would exceed 10,000 Swiss francs or the assets are transferred intercompany; and
- the transfer qualifies as a tax-neutral reorganisation for corporate income tax purposes or concerns a transfer of a totality of assets or part thereof according to the Merger Act.

On a voluntary basis, the procedure may be applied if real estate is transferred or significant interest is proven (especially in case of a transfer of an organic business unit, a totality of similar assets or the assets to be transferred serving a similar business activity). This would apply in most cases between unrelated parties. As a consequence of the notification procedure, the acquirer takes over the same VATable basis and use for VAT purposes. That is, they could benefit from an additional input VAT refund or suffer from a repayment of input VAT refunded to the seller if the acquirer changes the use during the respective period (five years or 20 years for real estate).

A share deal typically is exempt from VAT without credit.

7 Net operating losses, other tax attributes and insolvency proceedings

Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

Principally, a change in ownership of a Swiss entity in a share deal has no influence on the carry forward of tax losses, that is, losses from the past seven tax years can be carried forward and set off against the taxable profits of the actual period. There are exceptions, for example if the acquired company has already been brought into liquid form and has no commercial activity anymore. In case of a financial restructuring or recapitalisation, the tax loss carry-forward is timely unlimited. Other tax attributes are principally also not affected by a change of control.

In case of an asset deal, any tax loss carry-forwards remain with the selling company and may be set off with a gain resulting from the sale (leading to a step-up to fair market value for the acquirer). There are principally no special rules for acquisitions of bankrupt or insolvent companies. A change of ownership has generally no impact if the Swiss target companies qualify for a special tax regime, like the cantonal and communal taxation regimes for holding, mixed or domiciliary companies (which will be abolished with the SV17) or the application of a partial tax relief (tax holiday) of a Swiss target company.

8 Interest relief

Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Interest payments in general are tax deductible and not subject to Swiss withholding tax at the level of a Swiss acquisition company. However, since there is no tax consolidation or group taxation for income tax purposes, the interest deduction is only tax efficient to the extent the acquisition company has its own taxable income. Otherwise, debt pushdown structures or the creation of taxable income at the acquisition company level should be considered.

Interest deduction limitations may apply to related party debt, that is, debt provided by shareholders, related parties or third parties where the debt is secured by related parties. Thin capitalisation rules set a limit for maximum loan amounts by shareholders or related parties that are accepted by Swiss tax authorities. The maximum amount of accepted debt is determined by applying the safe-haven rates (ie, a per cent amount of allowed debt per asset category, such as 100 per cent debt-financing for cash or 70 per cent for participations or IP), which are set out in a circular of the Federal Tax Authority. The percentages are applied onto the fair market value of the corporation's assets. Related party debt exceeding that maximum permitted debt calculated on this basis will be treated as equity for tax purposes; accordingly, interest payments on such exceeding debt will be treated as constructive dividends that are subject to 35 per cent Swiss dividend withholding tax and non-deductible from the taxable profit of the company.

Further, such deemed equity is also subject to annual capital tax. In order to avoid adverse withholding tax consequences, loans to the Swiss acquisition company may be granted interest-free, if this is possible from a lender's perspective. Such interest-free loan would – other than a subsequent waiver of interest – not trigger stamp duty of 1 per cent on equity contributions. Where the direct shareholder provides debt in excess of the thin capitalisation limitations but benefits from a full dividend withholding tax relief (eg, based on a double tax treaty or as Swiss resident corporation holding at least 20 per cent in the Swiss target), the withholding tax cash out could be avoided by a proactive, timely notification of the hidden dividend distribution.

In addition, interest on related party debt must comply with arm's-length terms. Circulars published annually by the Federal Tax Authority set out the maximum safe haven interest rates that may be paid by a Swiss company on shareholder or related party loans, generally with higher rates if the loans are denominated in foreign (non Swiss francs) currency. If the debt does not qualify as deemed equity (see above) and the safe haven interest rates are complied with, the interest is generally tax deductible. Higher interest rates may be accepted if the arm's-length character or a third-party test can be evidenced. This question can be addressed in a tax ruling to obtain certainty.

With respect to interest withholding tax, the Swiss '10/20/100 non-bank rules' need to be considered in case a bond is issued by a Swiss acquisition company or a 'collective fundraising' scheme is used. In this case, withholding tax of 35 per cent is levied on interest due that can be refunded based on Swiss domestic law for a Swiss lender or depending on the applicable double-tax treaty for a foreign lender. A loan facility qualifies as a collective fundraising where the aggregate number of non-bank lenders (including sub-participations) to a Swiss company under a facility agreement exceeds 10 (if granted under equal conditions) or 20 (if granted under different conditions, eg, various tranches or facilities), and the total amount of such debt exceeds 500,000 Swiss francs. Cash pooling does not amount to collective fundraising, unless the aggregate number of non-bank lenders exceeds 100 and the total amount of such debt exceeds 5 million Swiss francs. The Swiss withholding tax exposure under the 10/20/100 non-bank rules may be mitigated under certain conditions if acquisition debt is granted to a foreign entity and lent on to a Swiss subsidiary (acquirer). The borrowing via

a foreign subsidiary of a Swiss parent could, however, trigger Swiss interest withholding tax, if the collective fundraising criteria are met by the foreign borrowing subsidiary, the Swiss parent guarantees the debt and the borrowed funds are lent on to a Swiss company (based on newly introduced rules there is an exemption to this treatment in case the foreign subsidiary does not lend more than its equity and in case the set-up is not considered a tax avoidance). Further, federal and cantonal Swiss withholding taxes on interest may arise if a loan is directly or indirectly secured by Swiss real estate; the tax rate depends on the location of the real estate. However, many Swiss double tax treaties reduce withholding taxes on interest to zero.

The tax-efficient pushdown of acquisition debt on the target level is not easy to achieve, as Switzerland has no consolidation for income tax purposes. A debt pushdown of acquisition debt by merging the acquisition company with the target company generally is viewed as abusive from a tax perspective by the Swiss tax authorities if the acquisition company had no taxable income to set off the interest expenses itself. Debt pushdown can typically per current practice be better achieved by strategic buyers (Swiss operating acquisition companies with their own taxable income) or by careful structuring. The distribution of debt financed dividends (leveraged dividends) whereby the target company resolves a dividend that is not directly settled in cash but left outstanding as an interest-bearing downstream loan towards the shareholder or settled by the assumption of external acquisition debt and the allocation of interest expenses to the target company may be possible, always within the limitations of the thin capitalisation rules. In addition, debt financed intercompany acquisitions, such as the acquisition of shares or assets from group companies by the Swiss target against an interest-bearing loan may be possible.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?

Tax risks are usually addressed in the asset purchase agreement (APA) or share purchase agreement (SPA) in representations and warranties and a tax indemnity clause.

Historic tax risks remain with the target company in case of a share deal. A tax due diligence and the requesting of sufficient SPA protection for identified risks is thus highly recommended to an acquirer.

Typically, an acquirer asks for tax representations and warranties to be granted by the seller in the SPA for pre-closing periods in order to obtain general protection relating to tax compliance status, tax registrations, tax filings and tax payments as well as certain tax attributes and the absence of blocking periods, old reserves for withholding tax purposes, foreign permanent establishments or reversals of past depreciation of participations or loans. Tax indemnities are either granted for the pre-closing period or until a locked box date (depending on the purchase price mechanism) and either broadly for all taxes payable that are not already reflected in the purchase price (as debt) or only for specific risks identified. The goal of those clauses is to shift the liability for tax obligations originating from pre-closing periods back to the seller. Claims under a warranty or indemnity should principally be considered as a purchase price reduction between acquirer and seller and would be income tax neutral and as such not subject to withholding tax. Direct claims by the target against the seller could result in taxable income. Even if the payment would be structured as contribution via the purchaser, 1 per cent stamp duty on the contribution into the Swiss target could be triggered. Thus, both should be avoided and the indemnification should be made between acquirer and seller.

An acquirer in an asset deal can be liable for certain taxes, like VAT, customs and social security contributions and potentially payroll taxes and should seek protection in the APA. Claims from acquirer against seller would usually be a purchase price reduction and may reduce the capital gain for the seller and step-up (depreciation basis) for the acquirer. No withholding taxes should arise on such payments, but transfer taxes and VAT may need to be adjusted accordingly.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out and why?

A post-acquisition merger of the (Swiss) acquisition vehicle and the acquired company is often contemplated and can generally be done on a tax-neutral basis. The benefit is the integration of the acquired business by combination with the existing business of the acquirer in Switzerland, the reduction of legal entities and the faster access to operating cashflow in the target entity irrespective of distributable reserves. The latter is often requested from financing banks, as the bank debt is then on the level of the target company and directly secured by the target's assets.

From a tax perspective, such merger can have the benefit of offsetting taxable profits of the operative target business with interest expenses from the acquisition financing. However, if the acquisition company does not have its own taxable income, such offsetting is usually not permitted by the Swiss tax authorities but seen as abusive after a merger (debt pushdown). Even if this tax benefit is not achieved, the merger can be done for the abovementioned reasons.

If the Swiss target entity has been acquired from Swiss resident individuals and the indirect partial liquidation rules apply, a merger with the acquisition company within five years after the transaction would trigger the income taxation for the sellers as if the target entity had distributed its reserves to the sellers. Depending on the amount of taxes triggered and whether the acquirer would be liable according to the SPA for such taxes towards the sellers, no merger with the acquisition company should be performed during five years after the transaction; side-stream mergers or mergers within the target group, in contrast, should generally not trigger the indirect partial liquidation taxation.

A merger of the Swiss acquirer with a Swiss target that had been held by non-Swiss shareholders or shareholders not being entitled to a full withholding tax reductions on dividends from the Swiss target should be carefully analysed as they could trigger non-refundable Swiss withholding taxes on the amount of the purchase price less share capital and potential capital contribution reserves ('liquidation by proxy').

Additionally, intragroup transactions in the acquired target group may be used in certain cases to generate distributable reserves (eg, an intragroup transfer of a participation to another group company at fair market value with the potential capital gain being subject to the participation deduction if the required conditions are fulfilled), which may then be used to upstream cash to the acquisition company and further.

11 Spin-offs

Can tax neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

A tax-neutral demerger of a Swiss company may be carried out in the form of split-up or spin-off and is principally tax-neutral (ie, no taxable realisation of transferred hidden reserves) under the following cumulative conditions:

- the tax liability of the companies continues in Switzerland;
- one or more business or business units are transferred;
- the transfer is done at (tax) book value, against sufficient equity; and
- both Swiss entities continue their businesses after the demerger.

Under these conditions, a demerger does not further trigger any transfer taxes, like securities transfer tax or real estate transfer tax. Registration fees or notary fees upon the transfer of real estate may still apply.

Because the demerger is not subject to any blocking period, it is often used by sellers as a pre-deal structure opportunity in order to transfer a business unit to a new entity and sell it through a share deal.

The demerger can be structured in different ways, for example as direct demerger (split of a legal entity) under the Merger Act or as

contribution of the business unit into a new subsidiary and distribution of the shares in the new subsidiary to the shareholders.

In order to be also neutral for stamp duty purposes, certain restrictions regarding the maximum amount of newly created share capital at the level of the new entity need to be considered.

Other ways to achieve, under certain conditions, a tax-neutral spin-off include the transfer of (partial) business or operating fixed assets to a Swiss subsidiary, Swiss parent or sister company, however always subject to a five-year blocking period. The transfer of participations to a Swiss or foreign subsidiary can generally be done tax neutrally and is not subject to a blocking period.

Usually, a tax loss carry-forward can be transferred with the tax-neutral transfer of a (partial) business unit if and insofar as the loss is related to the business activity of the transferred unit. Otherwise, the tax loss carry-forward remains with the transferor. Thus, it is recommended to confirm the allocation of the tax loss carry-forwards in a tax ruling with the competent tax authorities.

12 Migration of residence

Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

In general, a migration of a company from Switzerland is considered a deemed liquidation, triggering the same tax consequences as a statutory liquidation process. In particular, hidden reserves (fair market value less tax book values of business of the company) would be subject to income tax at the applicable tax rate of the Swiss company. Furthermore, the 'liquidation surplus' (net assets at fair market value, minus nominal share capital and recognised capital contribution reserves) would be subject to 35 per cent dividend withholding tax: depending on the domicile of the shareholders of the former Swiss entity and the applicable double tax treaties, the withholding tax may be notified instead of paid or partially or fully refunded. No income tax will generally be due, if the business activity of the Swiss entity is continued upon the migration through a permanent establishment in Switzerland and the book values are carried on and remain subject to Swiss taxation based on the international allocation between foreign headquarter and Swiss permanent establishment. However, withholding tax on the liquidation surplus will still be due (see above).

13 Interest and dividend payments

Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Dividends paid by a Swiss company are principally subject to a withholding tax at a rate of 35 per cent. However, this withholding tax may be fully reclaimed by a Swiss tax resident shareholder or may also be notified by a Swiss corporate shareholder holding at least 20 per cent in the Swiss company to the Swiss Federal Tax Authority (in order to avoid a temporary cash out) within a certain timeline. While dividend withholding tax is meant to be a final burden to non-Swiss resident beneficiaries, full or partial relief may be available under an applicable Swiss double taxation treaty. Also in the cross-border context, the notification procedure for dividends paid to a qualifying corporate shareholder (owning at least 10 per cent of the equity of the distributing Swiss entity or the percentage required under the applicable tax treaty and meeting all further conditions for treaty benefits) may be applicable. It requires the previous filing of a specific application form with the Federal Tax Authority and the demonstration that the foreign beneficiary fulfils all conditions for the requested tax treaty benefits.

On interest payments, there is generally no withholding tax levied in Switzerland, with the exception of interest payments on qualifying bonds or collective fundraisings (see question 8 regarding 10/20/100 non-bank rules) and on interest paid on bank deposits (with the Swiss entity qualifying as a bank under the Swiss withholding tax provisions) exceeding a defined minimum amount. Further, withholding tax may apply if the loan is secured by Swiss real estate (see question 8). Dividend withholding tax may apply on intercompany interest if the interest qualifies as hidden dividend distribution (in case the Swiss entity is thinly capitalised or the interest exceeds the arm's-length terms).

14 Tax-efficient extraction of profits

What other tax-efficient means are adopted for extracting profits from your jurisdiction?

In addition to dividends and interest, other intercompany payments could be considered to extract profit from the Swiss entity. Such payments need to comply with arm's-length terms in order to be accepted from a tax perspective. Switzerland usually follows the OECD transfer pricing guidelines in this respect.

There is no Swiss withholding tax on royalties or management fees. Accordingly, it would be possible to extract profits by such payments provided they are at arm's length.

Disposals (from the seller's perspective)

15 Disposals

How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

Usually the seller has an interest to carry out the disposal by selling the stock of the company or of the foreign top company: a Swiss resident individual holding the shares as private assets can benefit from a tax-exempt capital gain when selling these shares (see question 1 regarding indirect partial liquidation risk). In contrast, the sale on a lower level or an asset deal would require the repatriation, which is subject to dividend taxation (fully taxable income or privileged taxation in case of a shareholding of minimum 10 per cent), a Swiss company holding at least 10 per cent in the Swiss target for at least 12 months will also prefer a share deal to benefit from the participation deduction (virtual tax exemption).

To the extent the foreign holding company is in a jurisdiction with a favourable double-tax treaty with Switzerland, the sale of shares by the foreign holding company followed by a dividend distribution to Swiss corporate shareholders can also be a tax efficient structure. Provided the dividends are not subject to foreign withholding tax, the Swiss shareholder can benefit from the participation deduction on dividends if its shareholding in the foreign holding is either at least 10 per cent or has a fair market value of at least 1 million Swiss francs (no minimum holding period applies to dividends).

An asset deal is generally less beneficial for a seller as it triggers a taxable gain for the seller. It may be considered if the seller has a tax loss carry-forward that would otherwise forfeit, the seller can make use of a deferral (re-investment relief for certain operating assets) or if the seller benefits from a low or privileged taxation and receives a higher purchase price by the acquirer due to the buyer's step-up and depreciation.

16 Disposals of stock

Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?

Based on Swiss unilateral law, irrespective of a double tax treaty, Switzerland does not impose tax on the gains of the disposal of stock in a local company by a non-resident seller (ie, a foreign seller without permanent establishment and without place of management in Switzerland).

One important exception applies at the cantonal or communal level where the share deal equals an indirect transfer of local real estate, such as the direct or indirect sale of a majority interest in a real estate company, (ie, a company that predominantly owns Swiss real estate for investment purposes). The exact qualification criteria for a real estate company vary between the cantons. Further, depending on the application of a double tax treaty between Switzerland and the residency of the seller, the taxation right of Switzerland may be restricted, for example currently under the double tax treaties with Luxembourg, Denmark or Germany. However, the majority of the Swiss tax treaties reserve the

right of the contracting state in which the real property is located to tax indirect gains upon the sale of company shares, if more than 50 per cent of the company's assets are comprised of local real property.

With regard to energy and natural resource companies, there are no special tax rules in Switzerland.

17 Avoiding and deferring tax

If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

As outlined above, a sale of all shares in the local company would be either tax exempt (Swiss individual holding the shares as private assets and not qualifying as securities trader) or virtually exempt, subject to the requirements of the participation deduction, at the level of a Swiss tax resident company.

Business required long-term assets can qualify for a deferral or rollover relief to the extent that the proceeds are re-invested within a certain time frame in the acquisition of other long-term assets. The sale proceeds of real estate cannot be rolled over to moveable long-term assets.

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